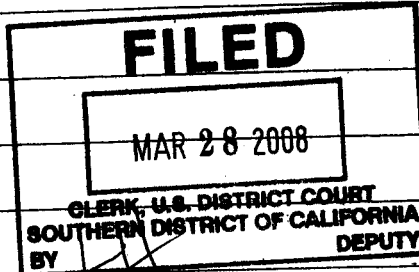


1 CRAIG SMITH

2 CDC\*: T09268

3 P.O. BOX 799005

4 SAN DIEGO, CA. 92179



5  
6 IN Propria Persona

7 UNITED STATES DISTRICT COURT FOR THE  
8 SOUTHERN DISTRICT OF CALIFORNIA  
9

10 CRAIG SMITH

CIVIL NO. 07-2077 BTM(RBB)

11 Plaintiff

12 vs.

13 DAN LINK, Deputy District Attorney,

Notice of Appeal

14 NICHOLAS GONZALEZ, San Diego Police

15 Officer,

16 CITY OF SAN DIEGO,

17 COUNTY OF SAN DIEGO,

18 ALBERT HARUTUNIAN, Judge of the Superior

19 Court of California, San Diego

20 Defendants. date: March 18, 2008

21  
22 Notice is hereby given that Craig Smith (plaintiff) in the above named case,  
23 hereby appeal to the United States Court of Appeals for the Ninth Circuit  
24 from the judgement of the above entitled Court "DISMISSING ACTION FOR FAILING TO  
25 STATE A CLAIM AND FOR SEEKING MONETARY DAMAGES" entered on March 3, 2008, it was  
26 also ordered "GRANTING MOTION TO PROCEED IN FORMA PAUPERIS" (of which to the  
27 GRANTING OF FORMA PAUPERIS "plaintiff seeks no appeal"). For the favorable  
28 termination rule in "HECK", on March 5, 2008, Court of Appeal of the State

1 of California, Fourth Appellate District, Division One, case no. D049993, reversed  
 2 in full the judgment of Superior Court of the State of California, For the County  
 3 of San Diego case no. SCD195342, see attached Exhibit "1" to be  
 4 included in the record on appeal

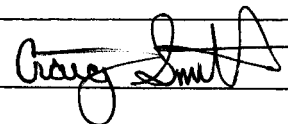
#### 5 6 ISSUES FROM THE DISTRICT COURTS ORDER

7 1. Heck's favorable termination rule as of March 5, 2008 is satisfied with a  
 8 full reversal on direct appeal

9  
 10 2. Criminal prosecutors are not absolutely immune when acting in a investigator role  
 11 and fabricating evidence, as in "Milstein v. Cooley" (C.A.9, Cal. 2001) 257 F.3d  
 12 1004 (9th Cir 2001), as in "Cruz v. Kauai County" (Hawaii) 2002, Milstein,  
 13 Supra, it is a 4th Amendment right not to have prosecutor personally attest to a false  
 14 statement of a biased source with no investigation, as in "Kolima v. Fletcher," 522  
 15 U.S. at 131, 118 S. Ct 502, (Quoting U.S. Constitutional Amendment IV, Absolute Immunity  
 16 is not protected when prosecutor personally attested to the equivalent of an affidavit  
 17 to the truth, declaring to be correct a certification, act of a witness, thus was not  
 18 entitled to absolute immunity, accord "Morley v. Walker 175 F.3d 756, 760 (9th Cir  
 19 1999), also "Bishop Paiute v. County of Inyo, 275 F.3d 893 (9th Cir. 2002)

20  
 21 3. Officer Gonzalez shield for qualified immunity is lost when he violated Constitutional  
 22 rights well established for fabricating evidence to mislead a magistrate/Judge  
 23 or Jury for enhancement of Probable cause, due process "Zamora v. City of Behen"  
 24 383 F. Supp. 2d 1315 (D.N.M. 2005) materially misled a magistrate  
 25 4. A Judge is liable for money damages in a §1983, when he acts in Clear Absence  
 26 of all jurisdiction, and when he violates the Civil Rights act of 1964, §1981.

27  
 28 Date March 18, 2008 : Respectfully Submitted



## EXHIBIT COVER PAGE

1

EXHIBIT

### DESCRIPTION OF THIS EXHIBIT:

Court of Appeals, Fourth Appellate District, Division One, State of California  
Case no D049993, reversal in full on direct appeal of Superior Court of  
California, County of San Diego case no, SCD195342

**NUMBER OF PAGES TO THIS EXHIBIT:** 3 **PAGES.**

To Be included on the record on appeal

### JURISDICTION: (Check only one)

- ☐ CDCR Administrative Appeal
- ☐ California Victim Compensation  
And Government Claims Board
- ☐ Municipal Court
- ☐ Superior Court
- ☒ Appellate Court
- ☐ State Supreme
- ☐ United States District Court
- ☐ United States Circuit Court
- ☐ United States Supreme Court

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CRAIG SMITH,

Defendant and Appellant.

D049993

(Super. Ct. No. SCD195342)

FILED  
Stephen L. K. Clerk  
MAR 5 2008  
Court of Appeal Fourth District

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian III, Judge. Reversed.

This appeal concerns two trials arising from Craig Smith's conduct of driving with alcohol in his system. Smith was arrested shortly after his vehicle was rear-ended by another vehicle. Approximately one hour after the accident, Smith's blood alcohol level was .17. Smith claimed this elevated level was the result of his drinking alcohol immediately *after* the accident. In the first trial, the jury acquitted Smith of driving with

being permitted to rely on a finding that Smith drove with a .08 or more blood alcohol level.<sup>8</sup>

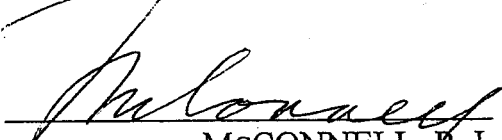
DISPOSITION

The judgment is reversed.



HALLER, J.

WE CONCUR:

  
McCONNELL, P. J.  
BENKE, J.

---

<sup>8</sup> In his brief on appeal, Smith also argues that the evidence was insufficient to support the driving under the influence verdict. This argument appears to be in large part premised on his assertion (which we have rejected) that the evidence of his postaccident .17 blood alcohol level was inadmissible. There was sufficient evidence to support the jury's verdict, including Smith's postaccident .17 blood alcohol level and his poor performance on the field sobriety tests.

Smith also challenges his sentence based on the United States Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [127 S.Ct. 856]. Given our reversal of the judgment as to guilt, we need not consider his sentencing assertions.

# CALIFORNIA APPELLATE COURTS

CASE INFORMATION



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**4th Appellate District Division 1 (Cases begin at D035601)**

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Court data last updated: 03/06/2008 05:05 PM

Case Summary Docket Scheduled Actions Briefs  
Disposition Parties and Attorneys Trial Court

## Disposition

The People v. Smith

Case Number D049993

Description:	Reversed in full
Date:	03/05/2008
Status:	Final The judgment is reversed.
Publication Status:	Signed Unpublished
Author:	Haller, Judith
Participants:	McConnell, Judith (Concur) Benke, Patricia (Concur)
Case Citation:	

[Click here to request automatic e-mail notifications about this case.](#)

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**PROOF OF SERVICE BY MAIL**

STATE OF CALIFORNIA       )  
  ) SS  
COUNTY OF SAN DIEGO )

CRAIG SMITH T09268

[C.C.P. §§ 446, 2015.5; 28 U.S.C. §1746]

I, Ronald Ward, am a resident of the State of California and am over the age of eighteen years and am not a party to the above-entitled action. My address is listed below.

On March 19, 2008, I served the following documents:

Notice of Appeal.  
Including Exhibits

by placing a true copy thereof enclosed in a sealed envelope with First Class postage thereon fully prepaid in the United States Mail by delivering to prison officials for processing through the Institution's internal legal mail system at San Diego California, addressed as follows::

United States District Court  
Southern District of California  
Office of the Clerk  
880 Front Street, Suite 4290  
San Diego, California, 92101

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed in the County of San Diego, California on 3-19-08 Ronald Ward

Ronald D. Ward  
F21-130 L

P.O. Box 799005  
San Diego, CA 92179-900 5

Pursuant to the holding of the United States Supreme Court in Houston v. Lack 108 S. Ct. 2379, 487 U.S. 266, 101 L.Ed.2d 245 (1988) and FRAP, Rule 4 (c) inmate legal documents are deemed filed on the date they are delivered to prison staff for processing and mailing via the Institution's internal legal mail procedures.

# United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Craig Smith

V.

## JUDGMENT IN A CIVIL CASE

Dan Link, Nicholas Gonzalez, Albert T. Harutunian,  
III, City of San Diego, County of San Diego

CASE NUMBER: 07cv2077-BTM(RBB)

☐

**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that this action is dismissed for failing to state a claim and for seeking monetary damages against defendants who are immune. ....

March 3, 2008

Date

W. Samuel Hamrick, Jr.

Clerk

s/V.Trujillo

(By) Deputy Clerk

ENTERED ON March 3, 2008



1  
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4  
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6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 CRAIG SMITH,  
12 CDCR # T-09268

13 Plaintiff,

14  
15 vs.  
16

17  
18 DAN LINK, Deputy District Attorney,  
19 NICHOLAS GONZALEZ, San Diego Police  
20 Officer, CITY OF SAN DIEGO, COUNTY  
21 OF SAN DIEGO, ALBERT  
22 HARUTUNIAN, Judge of the Superior Court  
23 of California, San Diego,  
24

25 Defendants.

Civil 07-2077 BTM (RBB)  
No.

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE AND GARNISHING  
\$350.00 BALANCE FROM  
PRISONER TRUST ACCOUNT  
[Doc. No. 2];**

**AND**

**(2) DISMISSING ACTION FOR  
FAILING TO STATE A CLAIM AND  
FOR SEEKING MONETARY  
DAMAGES AGAINST  
DEFENDANTS WHO ARE IMMUNE  
PURSUANT  
TO 28 U.S.C. §§ 1915(e)(2)(B)  
& 1915A(b)**

25 Plaintiff, a state inmate currently incarcerated at Richard J. Donovan Correctional Facility  
26 in San Diego, California, and proceeding pro se, has filed a civil rights Complaint pursuant to  
27 42 U.S.C. § 1983. Plaintiff claims that his constitutional rights were violated by a San Diego  
28 Police Officer, Deputy District Attorney and a Superior Court Judge when he was arrested and

1 ultimately convicted of driving under the influence. Plaintiff seeks compensatory damages for  
2 “malicious prosecution” and “false imprisonment.” (Compl. at 31.)

3 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead,  
4 he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)  
5 [Doc. No. 2].

6 **I. MOTION TO PROCEED IFP**

7 All parties instituting any civil action, suit or proceeding in a district court of the United  
8 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
9 U.S.C. § 1914(a). An action may proceed despite a party’s failure to pay only if the party is  
10 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493  
11 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).  
12 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in  
13 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28  
14 U.S.C. § 1915(b)(1) & (2).

15 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.  
16 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to  
17 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement shows that  
18 he has insufficient funds from which to pay an initial partial filing fee.

19 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and  
20 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further  
21 orders the Secretary of the California Department of Corrections and Rehabilitation (“CDCR”)  
22 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them  
23 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.  
24 § 1915(b)(1).

25 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

26 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also  
27 oblige the Court to review complaints filed by all persons proceeding IFP and by those, like  
28 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or

1 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,  
2 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”  
3 See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua  
4 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,  
5 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
6 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-  
7 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.  
8 2000) (§ 1915A).

9 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
10 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28  
11 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner’s suit  
12 make and rule on its own motion to dismiss before directing that the Complaint be served by the  
13 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits,  
14 but requires a district court to dismiss an in forma pauperis complaint that fails to state a  
15 claim.”); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing  
16 § 1915A).

17 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
18 allegations of material fact and must construe those facts in the light most favorable to the  
19 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
20 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). Here, however, even  
21 presuming Plaintiff’s factual allegations true, the Court finds his Complaint both fails to state  
22 a claim upon which relief can be granted and seeks monetary relief from defendants who are  
23 immune. See 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213  
24 F.3d at 446, n.1.

25 First, a review of Plaintiff’s Complaint indicates that he is seeking monetary damages  
26 based on allegations that a San Diego Police Officer gave false testimony at his criminal trial  
27 resulting in his conviction. In addition, Plaintiff also seeks monetary damages against the  
28 Deputy District Attorney who prosecuted him and the San Diego Superior Court Judge who

1 presided over his criminal trial.

2       These claims amount to an attack on the constitutional validity of an underlying state  
3 criminal proceeding, and as such, may not be maintained pursuant to 42 U.S.C. § 1983 unless  
4 and until he can show that conviction has already been invalidated. *Heck v. Humphrey*, 512 U.S.  
5 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir. 2003) (“Absent such a  
6 showing, ‘[e]ven a prisoner who has fully exhausted available state remedies has no cause of  
7 action under § 1983....’”) (quoting *Heck*, 512 U.S. at 489).

8       “In any § 1983 action, the first question is whether § 1983 is the appropriate avenue to  
9 remedy the alleged wrong.” *Haygood v. Younger*, 769 F.2d 1350, 1353 (9th Cir. 1985) (en  
10 banc). A prisoner in state custody simply may not use a § 1983 civil rights action to challenge  
11 the “fact or duration of his confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). The  
12 prisoner must seek federal habeas corpus relief instead. *Wilkinson v. Dotson*, 544 U.S. 74, 78  
13 (2005) (quoting *Preiser*, 411 U.S. at 489). Thus, Plaintiff’s § 1983 action “is barred (absent  
14 prior invalidation)--no matter the relief sought (damages or equitable relief), no matter the target  
15 of his suit (state conduct leading to conviction or internal prison proceedings)--if success in that  
16 action would necessarily demonstrate the invalidity of confinement or its duration.” *Wilkinson*,  
17 544 U.S. at 82.

18       In this case, Plaintiff’s malicious prosecution and false imprisonment claims “necessarily  
19 imply the invalidity” of his criminal proceedings and continuing incarceration. *Heck*, 512 U.S.  
20 at 487. In creating the favorable termination rule in *Heck*, the Supreme Court relied on “the  
21 hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of  
22 outstanding *criminal judgments*.” *Heck*, 511 U.S. at 486 (emphasis added); *see also Huftile v.*  
23 *Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005). This is precisely what Plaintiff attempts  
24 to accomplish here. Therefore, to satisfy *Heck*’s “favorable termination” rule, Plaintiff must first  
25 allege facts which show that the conviction and/or sentence which forms the basis of his § 1983  
26 Complaint has already been: (1) reversed on direct appeal; (2) expunged by executive order;  
27 (3) declared invalid by a state tribunal authorized to make such a determination; or (4) called into  
28 question by the grant of a writ of habeas corpus. *Heck*, 512 U.S. at 487 (emphasis added); *see*

1 also *Butterfield v. Bail*, 120 F.3d 1023, 1025 (9th Cir. 1997).

2 Plaintiff's Complaint alleges no facts sufficient to satisfy *Heck*. In fact, Plaintiff argues  
3 that *Heck* does not apply because he "foresees" that the California Appellate Court will decide  
4 his criminal appeal in his favor and release him from prison by the time this Court allows him  
5 to proceed in this matter. (Compl. at 29.) However, the Court takes judicial notice of the direct  
6 appeal, as well as a state habeas petition, filed by Plaintiff in regard to his criminal matter in the  
7 Fourth Appellate District of the California Court of Appeals.<sup>1</sup> The direct appeal has yet to be  
8 ruled on. See *The People v. Smith*, Cal. Ct. App. Case No. D049993 (Case fully briefed as of  
9 October 24, 2007); *In re Craig Smith*, Cal. Ct. App. Case No. D050928 (4th. Dist., Div. 1, May  
10 31, 2007 Order denying petition without prejudice pending outcome of petitioner's appeal).

11 Thus, because Plaintiff seeks damages for allegedly unconstitutional criminal proceedings  
12 in a San Diego Superior Court criminal case, and because he has not, and apparently *cannot*  
13 currently show his conviction has been invalidated, either by way of direct appeal, state habeas  
14 or pursuant to 28 U.S.C. § 2254, a section 1983 claim for damages cannot be maintained, see  
15 *Heck*, 512 U.S. at 489-90, and his Complaint must be dismissed without prejudice. See *Trimble*  
16 *v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (finding that an action barred by *Heck*  
17 has not yet accrued and thus, must be dismissed without prejudice so that the plaintiff may  
18 reassert his § 1983 claims if he ever succeeds in invalidating the underlying conviction or  
19 sentence); accord *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997).

20 Moreover, even if Plaintiff *could* show that the criminal conviction upon which his claims  
21 are based has already been terminated in his favor, his Complaint would still be subject to  
22 dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b) to the extent it seeks monetary  
23 damages against Deputy District Attorney Dan Link. Criminal prosecutors are absolutely  
24 immune from civil damages suits premised upon acts committed within the scope of their

---

25  
26 <sup>1</sup> A court "may take notice of proceedings in other courts, both within and without the  
27 federal judicial system, if those proceedings have a direct relation to matters at issue." *Bias v.*  
28 *Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d  
801, 803 n.2 (9th Cir. 2002) (alterations in original); *United States ex rel. Robinson Rancheria*  
*Citizens Council v. Borneo*, 971 F.2d 244, 248 (9th Cir. 1992)). In fact, Plaintiff has specifically  
asked this Court to take judicial notice of his criminal action. See "Amendment to Take Judicial  
Notice of Superior Court File SCD 195342," Docket No. 3.

1 official duties which are “intimately associated with the judicial phase of the criminal process.”  
2 *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *see also Buckley v. Fitzsimmons*, 509 U.S. 259,  
3 272-73 (1993); *Burns v. Reed*, 500 U.S. 478, 487-93 (1991). A prosecutor is immune even when  
4 the prosecutor’s malicious or dishonest action deprived the defendant of his or her liberty.  
5 *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986).

6 In addition, Plaintiff’s claims against San Diego Superior Court Judge Albert Harutunian  
7 are barred by absolute immunity. “Judges and those performing judge-like functions are  
8 absolutely immune from damage liability for acts performed in their official capacities.”  
9 *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). Therefore, as a Superior Court Judge  
10 for the State of California, Judge Harutunian has absolute immunity from civil proceedings  
11 relating to these actions, which were performed within his judicial discretion.

12 Thus, Plaintiff’s claims against Defendants Link and Harutunian will be dismissed  
13 pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b) for seeking monetary relief against  
14 defendants who are immune from such relief. *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213  
15 F.3d at 446, n.1.

16 Finally, Plaintiff may not sue Nicholas Gonzalez, a witness who testified for the  
17 prosecution during his trial, under 42 U.S.C § 1983 based on his testimony. “Witnesses,  
18 including police witnesses, are immune from liability for their testimony in earlier proceedings  
19 even if they committed perjury.” *Paine v. City of Lompoc*, 965 F.3d 975, 981 (9th Cir. 2001)  
20 (citing *Briscoe v. LaHue*, 460 U.S. 325, 345 (1983)). “Witness immunity also extends to  
21 conspiracies to commit perjury.” *Id.* (citing *Franklin v. Terr*, 201 F.3d 1098, 1101-02 (9th Cir.  
22 2000). *See also Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (witnesses are  
23 absolutely immune from suits for damages under 42 U.S.C. § 1983 for testimony given at trial,  
24 or for testimony given during adversarial pretrial proceedings); *Demoran v. Witt*, 781 F.2d 155,  
25 157-58 (9th Cir. 1986).

26 Thus, for all these reasons, the Court finds that Plaintiff’s Complaint must be dismissed  
27 sua sponte for failing to state a claim upon which relief can be granted and for seeking monetary  
28 damages against immune defendants pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b).



1 **III. CONCLUSION AND ORDER**

2 Good cause appearing, **IT IS HEREBY ORDERED:**

3 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is

4 **GRANTED.**

5 2. The Secretary of California Department of Corrections and Rehabilitation, or his  
6 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee  
7 owed in this case by collecting monthly payments from the account in an amount equal to twenty  
8 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court  
9 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).

10 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
11 **ASSIGNED TO THIS ACTION.**

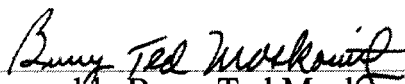
12 3. The Clerk of the Court is directed to serve a copy of this Order on James Tilton,  
13 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
14 Sacramento, California 95814.

15 **IT IS FURTHER ORDERED** that:

16 4. Plaintiff's Complaint is **DISMISSED** without prejudice both for failing to state  
17 a claim upon which relief may be granted and for seeking monetary relief against defendants  
18 who are immune pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). Moreover, because  
19 the Court finds amendment of Plaintiff's § 1983 claims would be futile at this time, leave to  
20 amend is **DENIED**. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial  
21 of a leave to amend is not an abuse of discretion where further amendment would be futile); *see*  
22 *also Robinson v. California Bd. of Prison Terms*, 997 F. Supp. 1303, 1308 (C.D. Cal. 1998)  
23 ("Since plaintiff has not, and cannot, state a claim containing an arguable basis in law, this action  
24 should be dismissed without leave to amend; any amendment would be futile.") (citing *Newland*  
25 *v. Dalton*, 81 F.3d 904, 907 (9th Cir. 1996)).

26 The Clerk shall close the file.

27 **DATED:** March 3, 2008

28   
Honorable Barry Ted Moskowitz  
United States District Judge

## Notice of Appeal Notification Form

**To:** Clerk, U.S. Court of Appeals

**Date:** 04/1/08

**From:** U.S. District Court, Southern District of California

**Subject:** New Appeals Case Information & Docket Fee Notification

### Case Information

Case Title: Craig Smith v. Dan Link, et al

U.S.D.C. No.: 07cv2077 BTM (RBB) U.S.D.C. Judge: Barry Ted Moskowitz

Complaint/Indictment/Petition Filed: Complaint

Appealed Order Entered: 3/3/2008

Notice of Appeal Filed: 3/28/2008

Court Reporter: n/a

COA Status: ☐ Granted in full/part (appeal only) ☐ Denied (send clerk's file)

### Docket Fee Notification

Docket Fee: ☐ Paid ☐ Not Paid ☒ No Fee Required

USA/GOVT. APPEAL: ☐ Yes ☒ No

Date F/P granted (Show Date and Attach Copy of Order): 3/3/2008

Was F/P Status Revoked? ☐ Yes ☒ No

Companion Case(s): (Please list consolidated cases, if applicable) \_\_\_\_\_

### Counsel Information

#### Appellant Counsel:

#### Appellee Counsel:

Craig Smith  
T-09268

N/A

PO Box 799005  
San Diego, CA 92179

Counsel Status: ☐ Retained ☐ Appointed ☒ Pro Se

Appointed by: \_\_\_\_\_  
(Attach copy of order/minutes)

### Defendant Information

Prisoner ID Number: T-09268

Bail: \_\_\_\_\_



Custody:   x  **SERVICE LIST**

**Counsel for Appellant(s) and Appellee(s), as listed on the previous page, have been sent copies of the following items:**

x	Transmittal of U.S.C.A. (Appellant and Appellee)
x	Case Information/Docketing Fee Notification Form. (Appellant Only)
x	Notice of Appeal. (Appellant, Appellee, U.S. District Judge, USPO, and Court Reporter)
x	Docket Entries (Appellant and Appellee)
x	Designation of Reporter's Transcript and Ordering Form. (Appellant Only, mailed separately)
	Order for Time Schedule. (Criminal Only) (Appellant, Appellee, and Court Reporter)
	Magistrate Judge's Report and Recommendation
	COA Order
x	F/P Order (Ruled on in Order Dismissing Complaint entered 3/3/08)
	Minute Order
x	Other: Clerk's Judgment entered 3/3/2008, Order Dismissing Complaint without Prejudice entered 3/3/2008

Form Completed And Documents Served By U.S. District Court Deputy Clerk:

Lauren Hammer

Deputy's Name

**L. Hammer**

Deputy's Signature

**UNITED STATES DISTRICT COURT**

Southern District Of California  
Office Of The Clerk  
880 Front Street, Room 4290  
San Diego, California 92101-8900  
Phone: (619) 557-5600  
Fax: (619) 702-9900

W. Samuel Hamrick, Jr.  
Clerk of Court

To: Clerk, U.S. Court of Appeals  
P.O. Box 193939  
San Francisco, CA 94119-3939

Re: **USCA No:**  
**USDC No: 07cv2077 BTM (RBB)**  
**Smith v. Link, et al**

Clerk, U.S. Court of Appeals, enclosed herewith you will please find:

x	Copy of the Notice of Appeal	x	Docket Entries
x	Case Information/Docket Fee Payment Notification Form		
	Order for Time Schedule (Criminal)		
	Original Clerk's Record in	set(s) of	volume(s).
	Reporter's transcript's transcripts in	set(s) of	volume(s).
	Exhibits in	envelope(s)	box(es) folders(s)
x	Judgement Order	x	F/P Order
	CJA Form 20		Minute Order
	Certificate of Record		Mandate Return
	Magistrate Judge's Report and Recommendation		
	COA Order		
	Amended docket fee notification form		
	Order Appointing Counsel for Appeal		
x	Order Dismissing Complaint without Prejudice entered 3/3/2008		
x	Please acknowledge on the enclosed copy of this transmittal		

Sincerely yours,

W. Samuel Hamrick, Jr.  
Clerk of Court

Date: 04/1/08

By: **L. Hammer**  
Lauren Hammer, Deputy